No. 686

IN THE

Supreme Court of the United States

October Term, 1944

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Petitioner

against

UNITED STATES OF AMERICA

Respondent

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

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No. 666

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UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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This Court has granted a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, dated and filed August 23, 1944 (1697), pursuant to its opinion rendered August 23, 1944, affirming the judgment of the United States District Court

for the Northern District of California, Southern Division (1366-8), entered upon a verdict of guilty (1365) and based upon an indictment (4-47) charging this petitioner, among others, with violation of Section 1 of the Sherman Anti-Trust Act (27).

The petitioner's application to the United States Circuit Court of Appeals for a rehearing was denied on October 14, 1944 (1698).

A copy of the opinion of the Circuit Court of Appeals begins on page 1674 of the record. It is officially reported in 144 Fed. (2d) 546.

The District Court did not render an opinion.

Statement of Jurisdiction

The jurisdiction of this Honorable Court is under Section 240(a) of the Judicial Code, 28 U.S.C. Ann., sec. 347(a).

Federal Statutes involved are the Sherman Act, sec. 1, 15 U.S.C. Ann. 1, the Clayton Act, 29 U.S.C. Ann. 52, the Wagner Act, 29 U.S.C. Ann. 151, and the Norris-LaGuardia Act, 29 U.S.C. Ann. 102 *et seq.*

Pertinent provisions of these statutes are quoted at pages 34-36, *post*, and at other places in the course of the ensuing argument. They are also quoted in the Appendix (p. 75) of the brief for the Bay Counties District Council *et al.* (No. 667).

Questions of Law Involved

1. Does the first count in the indictment state facts constituting a violation by this petitioner of Section 1 of the Sherman Act?

2. Should the motions of this petitioner, made at the close of the trial for the dismissal of the indictment or a directed verdict of acquittal as to it, have been granted?

3. Should the conviction of this petitioner be reversed for prejudicial errors of law made during the trial, in the charge to the jury and in the refusals of this petitioner's requests to charge?

4. Should this petitioner's motions in arrest of judgment, to set aside the verdict and for a new trial, have been granted?

Concise Statement of the Case

The Indictment

(1) The indictment, in the first instance, consisted of two counts; but, upon the Attorney General's motion at the outset of the trial, the second count, charging a conspiracy to create a monopoly, was dismissed (111, 139).

The indictment charges that continuously since September 1, 1936, the defendants (composed of labor groups and manufacturing groups) conspired against Section 1 of the Sherman Act for the following "general purpose" and "object" (26-28):

> 1. To exclude manufacturers of millwork and patterned lumber located in states other than California from selling this material in, and from shipping it into, the San Francisco Bay Area.
>
> 2. To prevent lumber yards and jobbers in the Area from purchasing and bringing into the Area millwork and patterned lumber manufactured in states other than California.
>
> 3. To raise, fix, stabilize and maintain prices for millwork and patterned lumber shipped into California for sale in the Area.

(2) The indictment *does not charge* any extortion, racketeering, corruption, disorderly conduct, violence or threats thereof.

It *does not charge* that the union defendants did not aim at better wages and labor conditions.

(3) The indictment concedes the fact of "a labor dispute."

It expressly alleges that the defendant unions had made "wage scale demands" upon the defendant manufacturers (28); that the unions had backed these demands by picketing (30, 38); that the defendant manufacturers "agreed to accede and did accede" to these demands; and that manufacturers of millwork and patterned lumber outside California "have a lower wage scale than the millwork and patterned lumber manufacturers in the San Francisco Bay Area" (8).

The indictment itself concedes that the "wage scale demands of defendant unions" and the accession of the defendant manufacturers thereto found expression in a written agreement, dated September 21, 1936, concerning which the indictment alleges in Par. 28 (b) (28):

> "(b) Pursuant to said understanding set out in paragraph 28, subparagraph (a), the defendants, on or about the 21st day of September, 1936, entered into a contract and agreement covering the wages to be paid to the members of defendant unions, in which said agreement it was further agreed that: '* * * no material will be purchased from and no work will be done on any material or article that has had any operation performed on same by Saw Mills, Mills or Cabinet Shops, or their distributors that do not conform to the rates of wage and working conditions of this agreement' (except certain named items).
>
> "(c) The defendants have continued, in full force and effect, by subsequent agreements and understandings, the provisions of said agreement described in paragraph 28, subparagraph (b) with reference to the restriction on millwork and patterned lumber manufactured at lower wage rates than those then in force in the San Francisco Bay Area."

The indictment further alleges that the activity of the defendant unions was local to the Bay Area and resulted in a local wage scale agreement with the defendant manufacturers local to the Bay Area (27-32, 36). The defendant unions were also all localized in the Bay Area, with the exception of this petitioner which, in the indictment, is joined on the principle of imputation, to wit: "as advisor to, supervisor of, and governing body for carpenters' local unions and carpenters' district and state councils in the United States of America" (18).

There are the usual conclusory characterizations.

In other words, the indictment sought to invoke the criminal law in order to equalize wages in this industry by bringing them down to the lowest existing standard, whereas the organized labor and the agreement attacked in the indictment sought to equalize wages by bringing them up to the highest existing standard.

(4) On October 1, 1940, this petitioner and the other labor defendants demurred for insufficiency (42).

The demurrer was overruled on December 2, 1940 (103). Exception was taken (104) and constitutes an Assignment of Error (1592-3).

During the trial, this petitioner made the following motions:

1. A motion at the opening of the trial to dismiss the indictment for insufficiency (141).

2. A motion at the close of the prosecution's case to dismiss the indictment or for a directed verdict, because of insufficiency of evidence (596-7).

3. A like motion at the close of the whole case (1124-5).

4. Motions after verdict for a new trial and in arrest of judgment (1209, 1213, 1217).

These motions were all denied. Exceptions were taken and Assignments of Error filed (141, 598, 1125, 1221, 1393-5, 1606).

The Evidence

The testimony tells a consistent and undisputed story of a continuous labor struggle and dispute in the Bay Area for several decades, including the period of the alleged conspiracy. This case has grown out of that prolonged dispute.

(1) In 1921 the local employers had forced on the local employees an open shop, and they kept it open for fourteen years (829). Not until June 27, 1935, and after a two weeks strike, were the local unions again able to secure a closed shop agreement; but that agreement was terminable on sixty days notice by either side (754, 757). It was not signed by all the manufacturers in the Bay Area, and some non-union shops continued in operation (651, 758, 776, 831).

In consequence, in the spring of 1936 the controversy intensified itself again. An arbitration agreement was made and later revoked (605-10, 758-9, 763). On September 21, 1936, another closed shop agreement, stating a wage scale, was signed, but was again terminable on sixty days notice by either side (279-287). This agreement is the one referred to in the indictment (28). It soon broke down (834) and was followed by a new arbitration which resulted in a dispute as to the parties bound thereby (621, 772-3, 835-6). This dispute was ultimately compromised by the agreement dated October 17, 1938, which fixed a new and somewhat higher wage scale; but either side could terminate it after January 1, 1939 "upon notice" (290, 568, 629-630, 671, 773-4).

Obviously, these short term, revocable agreements were merely unstable *truces* in a continuous labor struggle by the local unions on three fronts, to wit: the front against all the employers in the Bay Area, the front against such of those employers as refused the concessions by the others, and the front against sub-standard wages, non-

union labor and non-union goods in and out of the Bay Area. The long-range view of the unions was to promote wages and unionization throughout the entire industry everywhere.

(2) The agreement of 1936 (Ex. 132, p. 280), which is the one mentioned in the indictment (28), contained the following paragraph (283):

> "16. In the interest of standardization of rates of wages and working conditions, it is agreed that no material will be purchased from, and no work will be done on any material or articles that has had any operation performed on same by Saw Mills, Mills or Cabinet Shops, or their distributors that do not conform to the rates of wage and working conditions of this Agreement. The purchase of and the working of the following products is excepted: (Then follows a list of certain excepted articles.)
>
> Nothing herein is to be interpreted as preventing the entire production and sale of any articles in its completed state to any buyer. Nothing herein is to be interpreted as to in any way interfere with any business of the Federal Government, or that of an interstate common carrier, or any regulations of the Federal Trade Commission, or the Sherman Anti-Trust Laws."

A substantially similar provision, with similar exceptions and reservations, was in the 1938 contract (Ex. 132, pp. 288-290).

Neither agreement classified the unexcepted articles according to geographical origin but only according to wage scale and working conditions, *no matter where their origin.* They had the same application to articles whether made in the Bay Area or made anywhere else.

(3) The evidence shows without conflict—at least the jury could easily have so found, if the question had been submitted to them—that the above-quoted clause as to

conformity "to the rates of wage and working conditions of this Agreement", was inserted at the insistence of the defendant unions; and that the list of articles exempted therefrom was added at the insistence of the employers and over the objection of the unions as a qualification of the union's demand for a completely closed shop (608-12, 648-57, 665-6, 740-1, 759-65, 792, 797-9, 802-3, 815-6, 829-33, 887-94).

Furthermore, the wage scales embodied in these written agreements were in no sense an offer from or fixed by the defendant manufacturers. They were not devised and extended as a bribe to assist in suppressing interstate commerce. On the contrary, these scales represented both in 1936 and 1938 a reluctant compromise of a bitter controversy over the subject of wages and working conditions, reached only after the disputes had been carried to the point of arbitration and the arbitration had broken down into fresh disputes as to the parties bound thereby. The ultimate wage scales as stated in each agreement were less than the unions demanded, and the ultimate exemptions were greater than the unions wished (426-7, 605-10, 620-1, 758-9, 763, 771-4, 782, 813-4, 834-9, 1018-23, 1034-5).

There is no evidence that the unions participated in the selection and fixing of prices by any of the manufacturers.

Furthermore, as shown hereafter, if there were any such issues of fact, they were not submitted to the jury.

The Rulings by the Trial Court

(1) At the trial the Court seemed to consider that these written contracts of 1936 and 1938 were *ipso facto* violations of Section 1 of the Sherman Act; and its charge to the jury was tantamount to a direction to convict.

That charge reduced the issue of guilt or innocence on the part of the union defendants to the single question (1153):

> "The sole question is whether defendants intended to *or did* restrain the shipment of millwork and patterned lumber in interstate commerce pursuant to an understanding between the labor union defendants and the non-labor defendants."

Inasmuch as any closed shop agreement barring non-union labor and goods made with non-union wages, necessarily restricts freedom of trade, this charge as to "the sole question" was tantamount to a direction to convict. The alleged issue thus charged to be exclusive was illusory as an issue of fact for the written agreements between the two groups were "an understanding" and "did" restrain the employers' freedom of trade to the extent of the terms thereof.

In the same breath, and clinching the effectualness of the charge as a direction to convict, the Trial Court ruled out as a qualification, excuse or defense on the part of the labor defendants any claim or proof that they were acting solely to protect their self-interest or their wage scale or working conditions, or to enforce their refusal to work on articles non-union made or not bearing the union label. Thus the Court charged (1152):

> "Though the motive of the labor union defendants was to protect their self-interest, you *must* find the defendants, or any of them, who so combined and conspired, guilty as charged."

The Court also charged (1152):

> "In this connection, I charge you that whether the millwork and patterned lumber involved in the testimony in this case was manufactured in mills whose employees were members of the United Brotherhood of Carpenters and Joiners of America or of its affiliated unions, or whether such millwork and patterned lumber bore a union label, *is not* to be considered by you."

The application of these binding instructions to the written agreements of 1936 and 1938 was both obvious and absolute. Indeed, the Trial Court made the application inescapable and positive by charging (1150):

> "If you find that the employer and labor union defendants entered into an agreement or understanding, oral or written, under the terms of which the employer defendants agreed not to purchase patterned lumber and millwork manufactured under a lower wage scale than that prevailing in the San Francisco Bay Area, including patterned lumber and millwork manufactured in states outside the State of California; such an agreement or understanding would constitute a violation of the Sherman Act as charged in the Indictment."

These instructions inevitably meant to the jury that, although under the agreements of 1936 and 1938 the test was not the geographical origin of the articles but solely the lack of union origin or union standards in their making, the Sherman Act was nevertheless violated irrespective of the purpose of the defendant unions to protect their self-interest in wages or working conditions or unionization, provided only that such agreements did in fact place some restriction on the freedom of interstate trade.

At the same time the union defendants were bound hand and foot to these mandatory instructions and rendered completely helpless by the Trial Court's refusal of all their requests for instructions on the subject of the agreements with the employer defendants, the purposes and self-interest of the labor defendants in making and acting under those agreements, the fact of "the labor dispute" and the legal consequences thereof, and the right of the union defendants to refuse to work on goods non-union made or not bearing the union label (1175-93). Exceptions and Assignments of Error were entered (1128, 1155-60, 1441, 1591, 1598-9).

(2) The written agreements of 1936 and 1938 were closed shop agreements,—the shops of the signatory manufacturers being thereby closed against both non-union labor and non-union materials made *anywhere*.

These agreements did not bar from the shops articles because they were made outside the Bay Area or the State. The only articles barred were those made under less favorable wage scales or working conditions. Such articles would be equally barred even if made in the Bay Area.

Such a closed shop has never before been held to be a violation of the Sherman Act,—notwithstanding that it does or may involve, as a consequence, some restraint or diminution of the freedom of trade and some effect upon costs and prices.

On the labor side, the very purpose of such an agreement is to protect or improve the scale of wages and hence the standard of living from the depressing competition of lower wages and lower standards of living, whether reflected in non-union services or in non-union goods. Such an agreement may well have some effect upon costs and prices in the area involved, either as making against a decline or as causing some increase. On the other hand, it may have the effect in the long run of improving wages and working conditions not only in the area involved but throughout the entire industry, and hence of increasing buying power and promoting trade everywhere. The American idea is that the community receives its return in the greater purchasing power and cultural standards of the workmen, and hence ultimately in a greater volume of trade.

But, under the law as charged by the Trial Court, such closed shop agreements are illegal *per se*, or at least are reduced to jury issues. A restraint of trade or a tendency to monopoly or an economic effect upon prices can always be claimed. Although the union may concededly be acting in its own interest and for its own ends, nevertheless under this charge to the jury any such interest or aim is out-

lawed by the simple argument that there was an agreement or "understanding" with a non-labor group and that this latter group also had in mind its own self-interest and a purpose to transmute its increased costs into increased prices. Obviously, such a view of the law converts every closed shop into a crime and a criminal or civil lawsuit and undermines the whole principle of the Clayton Act, the Wagner Act and the Norris-LaGuardia Act.

Nevertheless, the Circuit Court of Appeals has affirmed this charge to the jury and hence the conviction which inevitably ensued. It did so without saying a word about the charge or any of the union defendants' requests to charge.

(3) As to this petitioner (United Brotherhood of Carpenters and Joiners of America), which was made a party to the indictment by imputation of guilt (18), the Trial Court merely told the jury that in determining the guilt or innocence of a labor union, the jury was to proceed by the same test as they would apply to a corporation, to wit: "an examination of the acts of their agents" (1138); and that (1137):

> "The act of an agent done for or on behalf of a corporation and within the scope of his authority, or an act which an agent has assumed to do for a corporation while performing duties actually delegated to him, is deemed to be the act of the corporation."

The Trial Court made no reference to the broad autonomy of local unions under the Constitution of the Brotherhood in the matter of government, laws, trade policies and rules, strikes and other union activities (461-2).

The Trial Court also refused all our requests for instructions as to the requirements for finding guilty participation by this petitioner (1172-5), and such refusals are assigned as error (1761, *et seq.*). These requests are not mentioned in the opinion of the Circuit Court of Appeals.

In the Circuit Court of Appeals we challenged these instructions and refusals to instruct, on the following grounds:

(a) They erroneously applied to a criminal case the rule applicable in a civil case.

(b) Even in a civil case the alternative phrase was erroneous because it did not require that the act which the agent "assumed to do" must be found to fall within the scope of the "duties actually delegated to him".

(c) In a criminal case, guilt is personal and there is no such thing as guilt by mere imputation.

(d) Section 106 of the Norris-LaGuardia Act expressly exempts a labor union or organization from criminal responsibility by reason of the unlawful acts of an officer or agent "except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof."

The Rulings of the Circuit Court of Appeals

The opinion of the Circuit Court of Appeals does not discuss the Trial Court's charge to the jury or its rulings on the relevancy of evidence, or its refusal of all the petitioner's requests for instructions.

The opinion puts a certain construction on the indictment, holds that the indictment so construed was valid, and rules that the evidence was sufficient to sustain a conviction under that construction. It also rules that since the agreements of 1936 and 1938 professed to terminate the labor dispute, such dispute and the immunities under the Clayton Act and the Norris-LaGuardia Act were irrelevant.

Specification of the Assigned Errors to be Urged

The trial was long and the rulings adverse to the petitioner were very numerous.

As a consequence, many assignments of error have been made by this petitioner (1591-1606). In the making of those assignments of error this petitioner adopted and incorporated by reference many of the assignments of error made by the other union defendants, Bay Counties District Council of Carpenters, *et al.* (1441-1591).

These assignments of error are too numerous to quote. They fall, however, into certain classes:

1. Assignments challenging the overruling of the demurrer to the indictment and the refusal of this petitioner's various motions for a dismissal of the indictment as insufficient in fact and law.

2. Assignments challenging the denial of this petitioner's motion at the trial for a dismissal or for a directed verdict of acquittal because of the insufficiency of the evidence to show a violation by it of Section 1 of the Sherman Act.

3. Assignments challenging the refusal of the court to admit certain testimony offered by or on behalf of this petitioner during the course of the trial.

4. Assignments challenging the rulings of the court in striking out certain testimony which had been adduced by or on behalf of the petitioner.

5. Assignments challenging various instructions which were given by the trial court to the jury and which are quoted or specified at appropriate places in this brief.

6. Assignments challenging the refusal of the court to give to the jury certain instructions requested by the petitioner.

7. Assignments challenging the denial of the petitioner's motion for a new trial and the denial of its motion in arrest of judgment.

Many of the foregoing assignments of error are quoted at length, or their substance is set forth at length, in the brief for the other union petitioners, Bay Counties District Council of Carpenters, *et al*, No. 667. See pages 28 *et seq.* thereof.

Summary of the Argument

In the index to this brief the headings of the respective Points of our Argument are set forth verbatim and provide a convenient summary.

A further summary is provided in the "Concise Statement of the Case", page 3, *supra*.

POINT I

The indictment did not state facts sufficient to constitute an offense by this petitioner against Section 1 of the Sherman Act.

(1) Basic in the Circuit Court of Appeals' view of the law is its ruling that, notwithstanding that the agreements of 1936 and 1938 were mere short-term, revocable truces in a bitter and continuous labor struggle and dispute lasting for decades, the signing of those agreements had the following legal and factual consequences (1684):

(a) "The dispute is past."

(b) "The labor and non-labor groups are combined."

(c) "The Manufacturer Group and the Union Group are no longer 'participating in or interested in a labor dispute' as that term is used in § 5 of the Norris-LaGuardia Act."

The conclusion drawn is that labor's immunity from the Sherman Act, as conferred by the Clayton Act and the Norris-LaGuardia Act, when labor is engaged in pressing demands for better or securer wages or working conditions, ceases when those demands become embodied in an agreement. Thereupon there is "a combination"; and if the agreement restricts the employers' freedom of trade or creates greater costs which are or may be passed to the public in higher prices, the agreement is violative of Section 1 of the Sherman Act.

In other words, a labor dispute loses its character as such when a collective bargain is made.

Such an anomaly, we submit, not only subverts the whole principle, purpose and machinery of collective bargaining so carefully protected and encouraged by the Clayton Act and the Wagner Act, but it also subverts the very provision of the Norris-LaGuardia Act designed to guard against just such an anomaly, to wit, the provision in Section 104(h) which immunizes:

> "Agreeing with other persons to do or not to do any of the acts heretofore specified."

Among "the acts heretofore specified" are "ceasing or refusing to perform any work or to remain in any relation of employment", and "advising or notifying any person" of an intention so to refuse.

See also Sections 102, 105 and 113 of the Norris-LaGuardia Act, quoted at pages 34-36, *post*.

(2) A directly opposite view of the basic law and of these statutes was subsequently taken on October 12, 1944, by the Circuit Court of Appeals for the Second Circuit in *Allen Bradley Co.* v. *Local Union No. 3*, 145 Fed. (2d) 215, where that Court reversed a decree of the District Court

of the United States for the Southern District of New York, which had enjoined activities of the defendant union as violative of Section 1 of the Sherman Act, and dismissed the action on the merits.

In its opinion the Circuit Court of Appeals for the Second Circuit discussed the decision of the Circuit Court of Appeals for the Ninth Circuit in the instant case, and closed its discussion with these words (p. 83, *post*):

> "Nevertheless, with deference one may question the present extent of the *Brims* doctrine as here restated, or the view that a labor dispute loses its character as such as soon as a collective bargain is made. Compare the views of the same district judge in the *Bay Area Painters* case, *supra*."

The *Bay Area Painters* case thus referred to (to wit: *United States* v. *Bay Area Painters & Dec. Joint Com.*, D. C. N. D. Cal., 49 F. Supp. [illegible], 738) was a decision by the same Judge who tried the present case and was rendered after the verdict in the present case.

In its opinion in this *Allen Bradley Co.* case, the Circuit Court of Appeals for the Second Circuit made note of this subsequent decision by the Trial Judge in our case, and said concerning it (p. 87, *post*):

> "See also *United States* v. *Bay Area Painters & Dec. Joint Com.*, D. C. N. D. Cal., 49 F. Supp. 733, 738, saying 'it would seem beyond belief' that Congress, having carefully protected the machinery of collective bargaining, would then after the bargain has been made withdraw that protection and leave the parties liable for prosecution for criminal conspiracy, and distinguishing *United States* v. *Lumber Products Ass'n*, D. C. N. D. Cal., 42 F. Supp. 910, affirmed in part, 9 Cir., Aug. 23, 1944, ——— F. 2d ———."

Indeed, the facts in that case went much further than either the allegations or the evidence in the present case. In the *Allen Bradley* case, according to the Circuit Court's opinion therein (p. 218):

"The findings then show that 'agreements and understandings' entered into by the three groups—manufacturers, contractors, and union—gave them a complete monopoly which they used to boycott the equipment manufactured by the plaintiffs.

While the boycott as found ran the gamut of electrical equipment from highly complicated switchboards and control devices down to novelty lamp shades, the case of the modern switchboard is offered as typical. There are in New York City a number of companies manufacturing switchboards who, before these activities of Local 3, shared an open competitive market with many of plaintiffs. In return for a closed-shop agreement calling for higher wages and shorter hours for employees, however, Local 3 promised these local companies an exclusive market for switchboards within the city, so that they could name their own prices to offset increased production costs. Local 3 carried out its promise with the help of the electrical contractors. It had already won closed-shop agreements from a vast majority of the latter through a series of strikes, threatened strikes, and sympathetic strikes by other unions in the building trade, which threatened to tie up all construction work in New York City. It now secured the further terms that union members should work only on switchboards of local manufacture by union shops, and that the contractors should have the sole power to buy materials for any job, with a proviso as additional protection that only products bearing the union label would be utilized. Like the manufacturers, the contractors were not averse to the extra expense of union material and labor, when all competition was thus removed from the field."

(p. 218):

"All in all, the situation disclosed by the findings is that of an entire industry in a local area, quite dominated and closed to outsiders by a powerful union, whose members receive as a result exceedingly higher wages, shorter working hours, and improved working conditions, and whose co-partners—the local manufacturers and contractors—also gain by the greater profits achieved through the stifling of competition."

(p. 219):

"Moreover, as must be expected in cases where a local area is thus closed to outside products, the persons injured will include not only the excluded manufacturers and rival unions, but also—at least initially and very likely continuously—the consuming public, which must pay higher rates (as, indeed, it must also for raising of wages and lowering of hours of work) and does not receive the benefits of improved machinery or methods of operation. Thus it appears that general electrical work and equipment are costly in New York City, and instances are cited where equipment of plaintiffs was turned down for local equipment with union label at twice or three times the cost. Since the lowest bidder no longer gets city contracts, if it be not a union bid, the city has lost federal grants, which were premised upon acceptance of the lowest bid. An outstanding example of the consequences from this type of economic warfare to third persons is that on local manufacturer which has two price lists for its products, one for union use within the city at more than twice the price of the other for use without the jurisdiction."

(3) Of course, in the present case, the indictment is filled with conclusory characterizations and epithets; with charges of a purpose and intent to restrain interstate commerce; and with charges that such restraint and a consequent increase in costs and prices were the effects and results of the alleged conspiracy.

These stock allegations had already become standardized in the indictments in *United States* v. *Hutcheson*, 312 U. S. 219; *United States* v. *Carrozzo*, 313 U. S. 539; *United States* v. *Building & Construction Trades Council*, 313 U. S. 539; *United States* v. *International Hod Carriers*, 313 U. S. 539; and *United States* v. *American Federation of Musicians*, 318 U. S. 741. But in not one of those instances, did the presence of these stock generalizations and conclusions deflect this Supreme Court from dismissing the Government's pleading as insufficient.

Furthermore, in the present case these generalizations and conclusions are rendered the less competent and relevant by the specific and particularized allegations that there was a labor dispute, that "wage scale demands" were made, that elsewhere there were other manufacturers paying a lower wage scale, and that this labor dispute resulted in a written agreement with the employers wherein it was agreed that there would be closed shops in which there would not be introduced or worked any articles (other than those exempted) made by manufacturers that "do not conform to the rates of wage and working conditions of this agreement." (See Concise Statement of the Case, page 3, *supra.*)

Thus, it becomes evident that the present indictment is merely an elaborate effort by characterization and conclusion to turn an ordinary, written, closed shop agreement into the appearance of an elaborate conspiracy on the part of labor to assist employers "to raise prices by monopoly pricing" (to quote the Circuit Court of Appeals' opinion, p. 1684),—such assistance to be extended by acting as their tool to exclude from the Bay Area articles from Washington and Oregon.

But the particularized always controls the generalized, and mere conclusions must yield to the facts.

The actual written agreement quoted in the indictment (28) says nothing about any place of origin. Its restrictive test is not geographical, but a wage scale. It would be equally applicable to articles made at sub-standard wages in the Bay Area itself. It says nothing about assisting any employers to do anything. It says nothing about prices.

On its very face, this written agreement, incorporated in the indictment as its core, is, on the unions' part, an embodiment of as much of their "wage scale demands" as they were able to achieve by union pressure and collective bargaining. It was, on their part, their action and bargain in their own self-interest.

Nor does the quoted agreement say anything at all about a "monopoly", or a plan to "split the take" (1680), or about the selection or fixing of prices. Indeed, the second count in the indictment, which was the only count to charge monopoly and monopoly pricing, was withdrawn by the prosecution at the opening of the trial (111, 139).

(4) We intend to argue these considerations more elaborately in the succeeding Points of this brief. Here we can clinch the matter by quoting as follows from *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 503:

> "Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act. See *Levering & G. Co.* v. *Morrin*, *supra*; cf. *American Foundries* case, *supra*, 209; *Window Glass Manufacturers* v. *United States*, 263 U. S. 403."

POINT II

But irrespective of whether the indictment states an offense, the conviction of this petitioner cannot stand.

The basic position of the Circuit Court of Appeals that the agreement settling the labor dispute "split the take" by giving "the employer a monopoly price raising contract", was not the issue submitted to the jury.

The Circuit Court's further position that the agreements of 1936 and 1938 terminated the labor dispute and therefore terminated the labor immunities, rests on principles which overturn an unchallenged body of judicial authority, nullifies much of the Clayton Act, the Wagner Act and the Norris-LaGuardia Act, and begs the fundamental questions of fact and of law in this case.

On the other hand, the Trial Court erroneously instructed the jury that the agreements constituted a combination between a labor and a non-labor group and hence had no immunity from the Clayton Act or the Norris-LaGuardia Act; and that as matter of law they constituted a criminal offense against Section 1 of the Sherman Act if they "intended to or did restrict" interstate commerce.

The Trial Court in effect directed a verdict of guilty.

(1) The construction placed by the Circuit Court of Appeals upon Count 1 of the indictment is revealed in the following sentence of its opinion (1684):

> "The situation [in the *Hutcheson* case] is strikingly different from one where the agreement between employers and unions for the exclusion of the articles from outside the State is purposed at once to raise

prices by monopoly pricing and create an increased wage by such pricing."

The opinion of the Circuit Court of Appeals constantly refers to the agreement of 1936 as one for "price control", and as giving the "employer a monopoly price raising contract", with the union and the employer agreeing to "split the take" (1679, 1680, 1684).

But no such formula or issue was submitted to the jury; and, we contend, there was no evidence which would have justified the submission of any such issue to the jury.

Moreover, the charge of attempting "monopoly" had been withdrawn at the outset of the trial by the Attorney General's act in dismissing the second count of the indictment which charged an offense against Section 2 of the Sherman Act (111, 139).

Furthermore, as set forth in the Concise Statement of the Case (pp. 6-8, *supra*), these written agreements were actually mere short-term, revocable truces in a labor struggle and dispute which had been continuous in the Bay Area for decades.

The wage scales set forth in the written agreements of 1936 and 1938 were not all that the unions had demanded; and the exemptions of certain articles from the principle of the closed shop, as listed in those agreements, were not all that the employers had demanded.

Each agreement was itself a manifestation of a raging labor controversy which ultimately went to arbitration; and the arbitration became in each case a new center of controversy when certain employers claimed they were not parties thereto and would not be bound by the arbitral awards. The story is told on pages 6 to 8, *supra*, and is more fully told on pages 10 to 14 of the brief for The Bay Counties District Council *et al.* (No. 667).

The ultimate compromise in each case was a wage scale lower than that demanded by the unions, and, in the case of the 1938 agreement, lower even than the ar-

bitral award. Thus, in neither case was the ultimate wage scale arrived at in these temporary agreements in accord with the wishes and initial positions of any of the parties thereto. Each agreement merely represented a provisional and revocable equilibrium arrived at for a short term through opposing pressures. It was typical collective bargaining with complete success for neither side.

The unions were fighting to protect and, if possible, to advance, the gains which they had made in the Bay Area after twenty years of fluctuating warfare against embattled employers in that Area, against rival and hostile labor organizations there and elsewhere, and against the destructive competition of cheap unorganized labor there and elsewhere. The long-run view was that the preservation in the Bay Area of the unions' gains in wages and working conditions would help to advance the unionization, the wages and working conditions of carpenters and millmen everywhere.

There was no evidence that the unions' intent and purpose were to advance the employers' interest rather than their own. There was no evidence that their intent and purpose was to establish for the employers a monopoly or a scale of monopoly prices. There was no evidence that the unions participated in the selection or fixing of any prices at all. Any such contention would be a mere empty assumption, and contrary to the undisputed history of the agreements of 1936 and 1938.

In any event, even if there had been any such evidence, no such issues were submitted to the jury and no such findings were charged to be requisite to a conviction.

(2) The jury was at no time told that before it could convict the labor defendants it was bound to find that they "purposed at once to raise prices by monopoly pricing and create an increased wage by such pricing", or that they had agreed to "split the take".

On the contrary, the jury was expressly told that, although the raising of the price of millwork and patterned lumber in the Bay Area was *one* of the alleged "three objects" of the combination as charged in the indictment, it was not necessary, in order to convict, for them to find that price-raising was actually one of the objects; but that it would be sufficient to find any one of the other alleged "objects", to wit, restricting sales in the Bay Area by outside manufacturers, or restricting purchases in the Bay Area from outside manufacturers, not operating according to union standards. Said the Trial Court to the jury (p. 1140):

> "It is not incumbent upon the Government to prove that all three of the stated objects were sought or attained. Proof of one is sufficient."

As a result of this charge, there is now no way of knowing whether the jury found price-raising to be one of the alleged objects, as distinct from some restraint on sales or on purchases in the Bay Area. For all that appears, the jury may have found that the objective of the labor group was the maintenance of a wage scale and unionization, rather than price-raising, but that such objective would have some effect in restricting sales or purchases of non-union goods in the Bay Area.

(3). Indeed, when the Trial Court came to put to the jury the ultimate acid test of guilt or innocence on the part of the labor defendants, it did not include price-raising as a necessary objective on their part, but, on the contrary, proceeded on the predicate that an agreement between employees and employers in settlement of a labor dispute became a combination between a labor and non-labor group and derived no immunity from the fact that the labor group may have entered into it to promote their self-interest; and that, if the effect thereof was a restraint of interstate commerce, the labor defendants were criminally guilty under Section 1 of the Sherman Act.

In effect, the Trial Court charged as matter of law that a combination existed; that any motivation of self-interest on the part of the labor group was irrelevant; and that the only question was whether, by so combining, the labor group had in fact restrained the shipment in interstate commerce of millwork and patterned lumber not made according to union standards (1152-3).

Thus, the Trial Court charged (p. 1152):

> "Labor unions or their members may join together in promoting their self-interest, even though their acts in so doing may result in an undue obstruction of interstate commerce. But they can do this only so long as they act in their self-interest and do not combine with non-labor groups."

The Trial Court also charged (1151-52):

> "It would constitute no defense under the law, either to the employer defendants or to the labor union defendants, that the combination and conspiracy may have been arrived at as the result of a settlement of a labor dispute; and it would likewise constitute no defense under the law that any such combination and conspiracy may have been arrived at as the result of proceedings in arbitration of such a dispute."

All this amounted to instructing the jury that a labor group could with immunity act together in an obstruction —indeed, "an undue obstruction"—of interstate commerce, provided they were "promoting their self-interest" in so doing; but this immunity ended when their labor dispute ended in an agreement with the employers. From that point on, there was "a combination" between the labor and the non-labor groups; and hence, charged the Trial Court, the test of innocence or guilt from that point on was as follows (1153):

> "The sole question is whether defendants intended to or did restrain the shipment of millwork and pat-

terned lumber in interstate commerce pursuant to an understanding between the labor union defendants and the non-labor defendants."

This, we respectfully submit, amounted to a direction to convict, since the fact of an understanding between the labor and non-labor groups was established by agreements in writing, and since those agreements promoted the self interest of the labor group by establishing shops closed against non-union labor and non-union goods, and thereby necessarily wrought some restriction upon the employers' freedom of interstate commerce in services and goods.

(4) Hence we respectfully submit:

(a) The Circuit Court of Appeals begged the whole question by affirming on the avowed ground that it found in the evidence sufficient for a jury finding (not shown to have been made) of a purpose on the part of the labor group "at once to raise prices by monopoly pricing and create an increased wage by such pricing" (1684).

(b) The Circuit Court also erred in that there was no evidence sufficient to justify such a finding, even if it had been made.

(c) The Trial Court bound the jury to a view of the law which was different, which laid down different tests, and which was utterly erroneous and compelled a conviction.

(5) There was nothing at all in the agreements of 1936 and 1938 about prices or the increase thereof (280-3, 288-290).

The subject-matter of each agreement was a wage scale and working conditions, and the settlement of a labor dispute. The unions demanded that the employers exclude, from their shops both non-union employees and articles made under a less favorable wage scale and less favorable working conditions, *no matter where made.*

Neither agreement stipulated for the exclusion of articles because made outside the Bay Area or the State of California.

The unions' immediate object was to secure and protect the ability of their own members to obtain and maintain employment at a wage scale consonant with an appropriate livelihood. Their long-view object was to raise wages throughout the entire industry *everywhere*.

Their test was not geography or state lines or the identity or location of the manufacturer, but solely union standards.

To quote again Par. 16 of the agreement of September 21, 1936 (U. S. Ex. 132, pp. 282-8):

> "16. In the interests of standardization of rates of wages and working conditions, it is agreed that no material will be purchased from, and no work will be done on any material or articles that has had any operation performed on same by Saw Mills, Mills or Cabinet Shops, or their distributors that do not conform to the rates of wage and working conditions of this Agreement. The purchase of and the working of the following products is excepted:"

Not a word is said about prices or price control or the creation of a monopoly or a division of "a take". The employers were free to compete among themselves or with others, and to introduce into their shops material made anywhere in the United States provided it was made under rates of wages and working conditions as good or better than that in the agreement. The unions' members were free to work for others than the signing employers.

Surely, as free men, the members of these unions had the right to refuse or refrain from working on materials made under conditions which they believed to be inimical to their interests or to the interests of organized labor generally in the field of carpentry; and if they had the right so to refuse or refrain, they had the right to make with employers an agreement which recognized such right

to refuse or refrain and which embodied it in a settlement of the labor dispute caused by their assertion of that primary right, even though as a consequence there was some restriction on the freedom of trade or some economic effect upon prices.

Indeed, the indictment itself recognizes that "wage scale demands" were the content of the unions' position, and alleges that the defendant manufacturers "agreed to accede and did accede" to such "wage scale demands" (par. 28, p. 28). If the unions had the right to make such wage scale demands, the manufacturers had the right to accede thereto and to agree to the consequent closed shop.

(6) Of course, every closed shop, whether closed as to non-union employees or non-union goods or both, may make more costly to the public the product of such shops and will of necessity restrain trade and competition in services or goods or both.

But such is the cost which the American people expect and have decided to pay for free labor, for higher standards of living and of purchasing power on the part of the working millions, and for the collective bargaining which preserves and advances those standards. Thereby, in the long run, the total volume of trade is increased rather than restricted.

Under the decision of the courts below, there is, as we see it, the anomaly that labor may lawfully strike in support of wage scale demands which are lawful as demands, but if the granting of these demands will mean that the employers will or must seek or may get better prices for their products, then both the laborers and the employers "split the take" and the laborers become criminals.

That a closed shop—closed as to both non-union employees and materials—is a lawful labor objective and hence a lawful employment agreement, is thoroughly well settled and is illustrated in *United States* v. *Carrozzo* (the *Hod Carriers* case), 313 U. S. 539, affirming 37 Fed. Supp. 191, 193. See also:

Gundersheimer's, Inc. v. *Bakery, etc. Union*, 119 Fed. 2d 205 (U. S. Court of Appeals for District of Columbia);

United States v. *B. Goedde & Co.*, 40 Fed. Sup. 523;

Rambusch Decorating Co. v. *Brotherhood of Painters*, 105 Fed. 2d (C. C. A. 2d) 134; cert. denied 308 U. S. 587.

(7) Every agreement settling a labor dispute presupposes some "interest" on the part of the employers, quite as much as some "interest" on the part of the union, in making the agreement at all.

It has never heretofore been supposed that only agreements which leave no shred of advantage to the employers, or only agreements the cost of which cannot be passed even in part to the public, are the only agreements within the law.

(8) The law as declared below provides in its logic and in its effect a potent weapon for the destruction of the whole principle and basis of the closed shop, particularly when embodied in a settlement agreement made with a group of employees.

It assures the Government, of some third party asserting injury, a ready and certain means of always claiming motive or purpose or effect and thus of turning every such agreement into a jury issue,—and, what is much worse, a ready and certain means of claiming that the self-interest or purpose of the union is outlawed by the self-interest or purpose of the employers or by the effect which higher wages may have upon prices.

In a free competitive system higher wages make for higher prices. The increased cost thereby passes to the public; and it is usually the consequence of an agreement to pay higher wages that the new costs will reflect themselves in new prices. Is this consequence, or the possibility of it, an agreement "to split the take"? *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 502, answers "No".

POINT III

The views of the Trial Court that an agreement terminating a labor dispute was a combination; that labor's immunity ceased when such combination occurred; that such combination was a violation of Section 1 of the Sherman Act even though the Union's objective was to protect wages and working conditions, provided the effect was to restrict interstate commerce; and that the Clayton Act and the Norris-LaGuardia Act were not relevant to any issue before the jury, are abundantly revealed and emphasized by the Trial Court's charge and by its refusals of all requests by the labor defendants for clarifying instructions.

These refusals were error and proceeded on conceptions of law which, we submit, violated both statute and settled judicial authority.

A

Our Requests for Instructions

At the conclusion of the trial, this petitioner and the other labor defendants unsuccessfully presented in various forms a large number of requests for instructions concerning agreement with employers. These requests may be summarized briefly as follows:

1. Members of a union may lawfully "decline to work upon or handle" products made under conditions of employment deemed by them to be unfair to their union (1175).

2. In considering the agreement, a relevant issue as regards the labor defendants was whether or not they were "acting in their own self-interest to carry out legitimate objectives of labor" in the matter of wages and working conditions (1177).

3. "The elimination of price competition based on differences in labor standards" is a lawful objective.

of a labor union, "since in order to render a labor combination effective it must eliminate the competition from non-union made goods" (1182). (*Apex Hosiery* v. *Leader*, 310 U. S. 469, 503-4.)

4. In considering the agreement, a relevant issue as regards the labor defendants was whether they had "acted in their own self-interest and to carry out their own objectives of labor such as a better wage scale and conditions of employment and more jobs for the union members" (1182).

5. The making of the agreement of September 21, 1936 was not in itself a violation of the Sherman Act (1183).

6. That agreement "was legal on its face" (1189).

7. The members of the defendant local unions had the lawful right to take the position that they "would do no work upon any material or article that has had any operation performed on same by saw mills, mills or cabinet shops or their distributors that did not conform to the rates of wage and working conditions prescribed by the agreement of September 21, 1936" (1183).

8. "If the defendant unions and their members deemed it to their interest to refuse to work on material not manufactured in conformity with the rates of wage and working conditions prescribed by the agreement of September 21, 1936, they had a legal right so to do" (1184).

9. In that event "the mere fact that such material may have been made in some state other than California does not render such refusal unlawful or in violation of the Sherman Act" (1184).

10. The agreement could not be a violation of the Sherman Act unless the jury found that it was not made by the labor defendants "to carry out the interests and labor objectives of the unions but solely with intent to conspire and combine with the employer defendants to make the unions the instrument of the employer to restrain interstate commerce to eliminate competition from millwork and patterned lumber in interstate commerce" (1186).

11. In considering the agreement, a relevant issue as regards the labor defendants was whether the prosecution had substantiated the allegations in the Indictment (32) that in the making thereof "the defendant unions were not attempting to enforce or protect the right to bargain collectively nor acting in the course of a legitimate labor dispute as to wages, hours and working conditions or as to any other legitimate objective of labor, but solely to prevent the manufacturers against whom the alleged combination and conspiracy was alleged to be directed from engaging in interstate commerce in millwork and patterned lumber in the San Francisco Bay Area" (1191).

12. "A case involves or grows out of a labor dispute when it involves persons engaged in the same industry, trade, craft or occupation, or who have direct or indirect interests therein and a person or association shall be held to be participating or interested in a labor dispute if he or it is engaged in the same industry, trade, craft or occupation in which such dispute occurs" (1179).

13. In considering the agreement, a relevant issue as regards the labor defendants was whether it "resulted from negotiations to fix terms and conditions of employment" "and grew out of a labor dispute" (1179).

14. In considering the agreement a relevant issue as regards the labor defendants was whether they made it "in order to establish a uniform condition of labor conditions, unionize other mills in the industry, gain jobs or better wages, or for any other legitimate purpose of a labor organization" (1180).

15. "Either agreements or acts done in furtherance thereof by labor defendants for the purpose of furthering the unionization of other shops in the same industry in order to better the conditions and wages of the employees is a legitimate labor activity and does not violate the Sherman Act" (1182).

The Trial Court threw aside all these requests. Exceptions were duly taken, and Assignments of Error were duly filed (1128, 1155-69, 1441, 1591).

We submit that under the Wagner Act, the Clayton Act, the Norris-LaGuardia Act and settled judicial authority, we were entitled to these instructions.

B

Our requests for instructions were sound in law and were necessary for an intelligent understanding by the jury of the controlling issues of law and of fact.

The Wagner Act (U. S. C. Ann. Title 29, Sec. 151) declares it to be the policy of the United States to rectify the inequality of bargaining power between employees and employers

> "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

The Norris-LaGuardia Act (U. S. C. Ann. Title 29) declares it to be the policy of the United States in labor matters that the individual employee (§ 102):

> "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 105 of that Act immunizes "the doing in concert of the acts enumerated in Section 104", when done by "persons participating or interested in a labor dispute".

Among the acts thus immunized, Section 104 includes the following:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . .

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 13 of this title."

Section 113 defines a labor dispute as follows:

"When used in sections 101-115 of this title, and for the purposes of such sections—(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

> (c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

The Clayton Act (U. S. C. Ann. Title 29) declares that certain acts shall not "be considered or held to be violations of any law of the United States" (§ 52). Among these "acts"; "whether singly or in concert", are terminating of "any relation or employment", or "ceasing to perform any work or labor", or urging "others by peaceful means so to do", or "ceasing to patronize or to employ any party to such (labor) dispute", or urging "others by peaceful and lawful means so to do", or "doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto".

Both the Trial Court and the Circuit Court held that these statutes and statutory provisions were all irrelevant. They were not called to the attention of the jury. The sole issue of fact submitted to the jury as controlling was not framed in relation thereto; and the jury were affirmatively instructed that the claims of the defendants thereunder established no defense and should not be considered. See preceding Point, page 22.

Our requests for instructions were designed to express the relevancy of these Acts; to instruct the jury as to their application and the conditions which they imposed upon any verdict of guilty; and to instruct the jury as to relevant and material issues of fact in accordance with the provisions of these Acts.

We respectfully submit that the sweeping refusal of all these instructions was basic error, and rested upon a view of the fundamental law of the case which led to the erroneous denials of the motions to dismiss the indictment as insufficient and of the motions to dismiss the prosecution's case as insufficient, and which also led to the verdict which thereby became virtually automatic.

POINT IV

The views of the law as expressed by the courts below are directly contrary to settled judicial authority. No other such decision has been made either before or since the Norris-LaGuardia Act.

The basic hypothesis of the Trial Court is that, although a union may with immunity under the Norris-LaGuardia Act demand as working conditions a shop closed against non-union employees or non-union goods, irrespective of where they come from, nevertheless accession and agreement by employers to such demand constitute as matter of law "a combination" which forfeits the immunity under the Clayton Act and the Norris-LaGuardia Act and is condemned by the Sherman Act, if goods which might come from other states are included in or affected by such closed-shop agreement.

No decision upholding such basic hypothesis has been or can be cited.

On the contrary, there are many decisions, including decisions by this Supreme Court, which dealt with achieved agreement between labor and non-labor groups and which held the very opposite.

These judicial decisions have within a month been fully analyzed and their effect declared by the Circuit Court of Appeals in the *Allen Bradley Company* case, 145 Fed. (2d) 215.

Hence, we shall content ourselves with fortifying that analysis with a few observations of our own.

The Hod Carriers Case

On the authority of the *Hutcheson* case, the Supreme Court two months later affirmed in *United States* v. *International Hod Carriers' Building and Common Laborers' District Council*, 313 U. S. 539, the decision of the Illinois

Federal Court dismissing the indictment as insufficient. In the District Court that case was reported as *United States v. Carrozzo*, 37 F. Supp. 191.

The importance of that decision in the present instance is that *there was an achieved agreement* between the union defendants and the employers, the effect of which was to restrict the interstate commerce of those employers and of manufacturers in other states, and to increase local costs and hence local prices; but the legality of which was sustained as a lawful accession by the employers to the demands and rights of the union defendants.

According to the indictment in that case, the union defendants by calling strikes and threatening to strike had forced paving contractors in the Chicago area to enter into working agreements with the defendant unions "requiring paving contractors using truck-mixers to employ the same number of men which they would employ if truck-mixers were not used" (p. 193). Also, according to the indictment, this conduct and these agreements were intended to exclude, and did exclude, mechanical truck-mixers from the Chicago area and thereby adversely affected the manufacturers of the truck-mixers, all of whose factories were outside the State of Illinois. Obviously, the effect of the agreements was artificially to add to costs and hence swell prices.

According to the opinion of Judge SULLIVAN in that case, the indictment not only alleged the coercing of the Chicago paving contractors into such agreements, but it also alleged (p. 193):

> "2. *The enforcement of these working agreements* between the Hod Carriers' Council and contractors by ordering member unions to strike, and by threats to strike.
>
> "3. Preventing building contractors in the Chicago area from using truck-mixers on building projects by strikes or threats of strikes.

"4. Refusing to approve the employment of, and ordering union members not to work upon, any building or paving project where truck-mixers are used.

"5. *Warning manufacturers of truck-mixers, and prospective purchasers thereof, that truck-mixers are not permitted to be sold or used in the Chicago area.*"

Obviously, the factual allegations of the indictment in this Chicago case, both as to the nature of the agreements with the local employers and as to the action of the local union defendants thereunder, went far beyond anything in either the present Indictment or in the evidence in the present case. There the union demanded what is called "excess employment,"—an objective altogether different from merely better wages as here. There, also, the union actually warned the manufacturers of truck-mixers (all of which were made in other states) that "the truck-mixers are not permitted to be sold or used in the Chicago area." In the present case, there was no such agreement and there was no such action, for the unions were not refusing to work on materials made outside the Bay Area merely because so made, but only on materials made at a lower scale of wages or under non-union conditions, irrespective of where they were so made.

Building & Construction Trades Council Case

An achieved agreement with employers engaged in interstate commerce was also alleged in the indictment in the above case, held insufficient on demurrer by the Supreme Court (313 U. S. 539) on the authority of the *Hutcheson* case.

There the indictment alleged:

"As a result of the wrongful and unlawful conspiracy engaged in by the defendants herein, it has become necessary for aforesaid trucking and drayage firms to hire trucks driven by individuals acceptable to defendants named herein, at an expense far in excess of compensation received by them under their said contracts with aforesaid interstate carriers."

The United Brotherhood of Carpenters Case

An achieved agreement with interstate purchasers and users of plywood was aiso alleged in the indictment in the above case, held insufficient on demurrer by the Supreme Court (313 U. S. 539) on the authority of the *Hutcheson* case.

There the indictment alleged:

> "The said acts of the defendants (strikes and picketing) have caused purchasers and users to cease to purchase Douglas fir plywood from the Harbor Plywood Corporation in the State of Washington for direct shipment from that state to other states in the United States."

The Musicians Case

In *United States v. American Federation of Musicians*, 47 F. Supp. 304 (N. D. Ill.—1942), affirmed *Per Curiam*, 318 U. S. 741, the District Judge said (p. 309):

> "The third contention of the Government deserves only a word. Here the employees seek only a contract with their employers for a 'closed shop' (in a sense large enough to include a shop which excludes not only non-union workers but also machines) and they seek this contract primarily for their (the servants') benefit and not for the benefit of a non-labor group. In the Court's opinion United States *v.* Brims, 272 U. S. 549, 47 S. Ct. 169, 71 L. Ed. 403, and like cases, are not pertinent here."

In this case the union comprised "virtually all musicians in the nation who make music for hire"; and it was charged not only with conspiring to prevent the use of "canned music" by radio broadcasting stations, in juke boxes in various establishments, and in the home, but also with accomplishing its purposes through coercion exercised on the record-making companies by notifying them

that the union members would not make musical records. Of course, the union was not interested in the working conditions of the employees of the record manufacturers or the radio stations, but was interested in providing work for its members; and it enforced its boycott in a national, not in a purely local market.

The Rambusch Case

In *Rambusch Decorating Co.* v. *Brotherhood of Painters*, 105 Fed. (2d) (CCA 2) 134, cert. den. 308 U. S. 587, there was *a written agreement* between an employer and an international labor union affecting an interstate industry. The question was whether that agreement was a violation of the Sherman Act.

The agreement provided that where a job was done by an employer in a state other than New York (where his seat of business was), he should pay whichever wage scale was the highest, and observe whichever set of hours was more favorable to labor—either the scale prevailing on the site of job, or the scale prevailing in New York.

The employer took a contract to paint a hotel in Roanoke, Virginia. The New York scale was $1.50 an hour, and the Roanoke scale was 75¢ an hour. The employer found he could hire no painters in Roanoke except on condition that he comply with the Union's demand that he pay the New York scale, to wit, $1.50 an hour. This demand doubled the employer's payroll. It eliminated his ability to compete in Roanoke with local contractors; and made it impracticable for him to bring his materials and supplies from New York to Roanoke. There is no question but that the Sherman Act covers the sale of services as well as the sale of commodities. (*U. S.* v. *Gold*; 115 Fed. (2d) (CCA 2) 236, 238.)

Nevertheless, the Circuit Court of Appeals for the Second Circuit unanimously reversed a determination that this agreement was violative of the Sherman Act. It said

the following, which is directly applicable to the present case (138):

> "Any contract designed to secure higher wages may restrain trade in one sense if it is effective, for it will hamper the weak employer who cannot afford the increase. In another sense, however, it may promote commerce by making for better and more peaceful labor relations. A contract with such a purpose is hardly to be held illegal of itself, or else all union organization goes."

The Goedde Case

Another case in which there was *an agreement* between the local unions and the local employers is *United States v. B. Goedde & Co.*, 40 F. Supp. 523,—a decision by Judge LINDLEY in the Eastern District of Illinois. There motions to quash the indictment were granted. According to the indictment "contracts" had been executed between the defendant mill owners and the defendant unions, (a) providing for employment of only such persons as were members of the union, *i. e.*, a closed shop, (b) permitting the mill owners to use the American Federation of Labor Union Label, and (c) "*excluding unlabeled lumber.*" These contracts were charged to be a combination and conspiracy in violation of the Sherman Act inasmuch as they had the effect of excluding or obstructing unlabeled lumber seeking to come into the East St. Louis area from other states,—thus creating, in these respects, a duplicate of the present case.

Judge LINDLEY *ruled that the Supreme Court's decision in the Hutcheson case required the application to such an agreement of the test of the Norris-LaGuardia Act.* He said—in language directly applicable to the agreements in the present case (p. 532):

> "In following the prescribed test, let us see which of the alleged means employed and acts of labor unions are exempted from criminal prosecution under

the Clayton Act. In the analysis hereinbefore set forth, the acts mentioned under 1 (a) and (b) (Paragraph 48 of the indictment), relating to contracts for closed shops and use of the label are clearly within the legitimate activities of unions as contemplated by the Clayton Act. Under 2 (a) and (b), (c) and (d) (Paragraph 49), it is alleged that the unions warned builders that they would not work with unlabeled materials; warned purchasers that such material would have to be removed and returned to the manufacturer and forced the makers of such material to remove the same from the job and return it to the plants. It would seem obvious that these acts are likewise granted immunity by the Clayton Act. Under 3 (Paragraph 50) we have alleged intimidation of builders by strikes and threats to strike, thereby forcing them to buy union labeled material, although similar products could be purchased at lower prices in other states. This too is exempt within the language of the Clayton Act. The resulting effect upon interstate commerce is purely incidental, United States v. Hutcheson, 312 U. S. 219, at page 241, 61 S. Ct. 463, 85 L. Ed. 788. Each of the acts thus far mentioned apparently is, by the Clayton Act, recognized as a legal economic weapon of labor unions."

It is true that Judge LINDLEY further stated, by way of dictum, that other charges in the indictment as to the use of violence and threats and as to the refusal to install material *merely because it was manufactured in states other than Illinois*, had no immunity under the Norris-LaGuardia Act; but those statements have no bearing on the present case, because here no violence was charged in the indictment and because the labor defendants were not charged in the indictment with refusing to work on materials coming from other states *merely because they came therefrom*. Moreover, no such issues were here presented to the jury. The sole charge here was that the labor defendants would not work on materials manufactured under less favorable rates of wage and working conditions no matter where such manufacture occurred.

According to the Trial Court's charge to the jury herein an agreement *to that effect* constituted as a matter of law —and without more—a violation of the Sherman Act.

On the other hand, under the decision of Judge LINDLEY, just such a refusal by the labor defendants and just such an agreement by employers recognizing and giving effect to just such a refusal, was held to be, as regards the labor defendants, within the immunities of the Norris-LaGuardia Act.

The Gundersheimer Case

Another case involving *an agreement* is *Gundersheimer's Inc.* v. *Bakery, etc. Union*, 119 Fed. 2d, 205 (U. S. Court of Appeals for the District of Columbia).

There a bakery corporation, having its shop in the District of Columbia, brought an action under the Sherman Act for treble damages by reason of a strike called among its employees to enforce the following demands (p. 206):

> "You can't buy cakes in Philadelphia, and you cannot make cakes in your own plant *unless you will agree not to buy any cakes out of town* . . . the reason being, they said, the wage scales in Philadelphia paid to men working in the plant there were lower than the scales paid to the men here."

There the defendant union was demanding that the plaintiff-employer *agree* with it not to purchase in Philadelphia and import into the District of Columbia any cakes made in Philadelphia where a lower wage scale was being paid. The Court of Appeals held that the Union had a lawful right to demand *such an agreement* and to close down the plaintiff's business in order to coerce such an agreement, notwithstanding that both the object and the express provisions of the agreement would prevent the plaintiff from securing, through interstate commerce, products for its shop.

Obviously, if the union had the right to destroy the plaintiff's business in order to coerce the agreement which it demanded, its success in obtaining that agreement could not be criminal.

Other Controlling Decisions

Bakery Drivers Local v. *Wohl*, 315 U. S. 769;
American Federation of Labor v. *Swing*, 312 U. S. 321;
Milk Wagon Drivers' Union v. *Lake Valley Co.*, 311 U. S. 91;
New Negro Alliance v. *Sanitary Grocery Co.*, 303 U. S. 552;
Lauf v. *E. G. Shinner Co.*, 303 U. S. 323;
Senn v. *Tile Layers Union*, 301 U. S. 468;
Amer. Foundries v. *Tri-City Council*, 257 U. S. 184, 209;
Barker Painting Co. v. *Brotherhood of Painters*, 15 Fed. (2) (C. C. A. 3) 16;
International Ladies Garment Workers' Union v. *Donnelly Garment Co.*, 110 Fed. (2) (C. C. A. 8) 892;
Taxi-cab Drivers' Local Union v. *Yellow Cab Co.*, 123 Fed. (2) (C. C. A. 10) 262;
International Ass'n v. *Pauly Jail Bldg. Co.*, 118 Fed. (2) (C. C. A. 8) 615;
U. S. v. *Local 807*, 118 Fed. (2) (C. C. A. 2) 684; 315 U. S. 521;
Green v. *Obergfell*, 121 Fed. (2) (Ct. of App. D. C.) 46;
U. S. v. *Gold*, 113 Fed. (2) (C. C. A. 2) 236.

POINT V

The dictum in the *Hutcheson* opinion concerning a combining by a labor group with a non-labor group and the footnote reference therein to the *Brims* case seem to have been the basis of the decision in the courts below. We submit that they were misunderstood and misapplied.

The best and most recent analysis of this dictum and footnote is contained in the opinion of the Circuit Court of Appeals for the Second Circuit in *Allen Bradley Co.* v. *Local Union No. 3*, 145 Fed. (2d) 215, decided October 12, 1944. That analysis so completely and forcefully expresses our own view that we quote from it at some length (223, 225):

> "The doctrine that a union necessarily forfeits the benefits of its statutory exemption from the antitrust laws when it combines with non-labor groups, which has been asserted by some authorities, is rested upon a reading in the most extensive form possible of a limitation noted by Mr. Justice Frankfurter to the doctrine stated in the *Hutcheson* case, as follows: 'So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under §20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.' And then to the word 'groups' he dropped a footnote, which reads: 'Cf. *United States* v. *Brims*, 272 U. S. 549, 47 S. Ct. 169, 71 L. Ed. 403, involving a conspiracy of mill work manufacturers, building contractors and union carpenters.' 312 U. S. at page 232, 61 S. Ct. at page 466, 85 L. Ed. 788. The *Brims* case affirmed the conviction of union members in the Chicago area who refused to work on non-union out-of-state mill work, with the result that an exclusive market was established for the local manufacturers; and the argument is that by

these words of the Court the *Brims* case is still left in unabated force.

"Now it is doubtful if Justice Frankfurter intended to define precisely just the extent of the limitation the Court had in mind. There was no necessity for him to do so at that time; and the matter had ramifications which the Court would not be likely to dispose of cavalierly. Hence the excepting sentence doubtless should not be read with exacting literalness; but in view of the use which has been made of it, we should note that it is not a positive affirmation, but a statement of only restricted reach. If its converse is to be accepted as an affirmative, it is not that combinations with non-labor groups are taboo, but only that when a union no longer acts in its self-interest and does so combine, then the licit and the illicit may have to be determined by a judgment as to the rightness or wrongness, etc., of the union end or purpose.

* * *

"It seems to us that this is the distinction the Supreme Court had in mind in its reference to the *Brims* case, and that the latter cannot now be held as broadly applicable as perhaps it was originally. As one commentator puts it, the *Brims* case 'should be deflated to its position as one of a line of cases uncritically condemning refusal to work on non-union products delivered in interstate commerce'—a position no longer tenable in the form stated—and that 'when the union is permitted to act alone, an agreement with employers should not automatically add the condemnable virus'. *Tunks, A New Federal Charter for Trade Unionism*, 41 Col. L. Rev. 969, 1012. This distinction seems to us the logical deduction to be made from the present state of Supreme Court decisions, and to be consistent with the statutes upon which the Court relies, and which do not in terms exclude business-labor combinations, but, as we have seen, do extend the inclusive labor dispute to include employment interest not themselves primarily engaged in a controversy as to terms and conditions of employment. On this basis it would follow that here the activities which cannot be forbidden to Local 3 acting by itself are not to be interdicted because other groups join with them to the same end."

This dictum in the *Hutcheson* case was, we believe, intended merely to be a restatement in other language of the following observation of this Court in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 510:

> "This is not a case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices. See *United States* v. *Brims*, 272 U. S. 549; *Local 167* v. *United States*, 291 U. S. 293."

POINT VI

The case of *United States* v. *Brims*, 272 U. S. 549, has no application for a number of reasons. If it can have any bearing, that bearing makes for a reversal.

1. The case was decided on November 23, 1926, six years before the Norris-LaGuardia Act and nine years before the Wagner Act were enacted.

2. It was decided at a time when *Duplex Co.* v. *Deering*, 254 U. S. 443, was supposed to represent as regards labor unions the proper view of the Sherman Act and the Clayton Act.

3. The Supreme Court's decision turned on a question of fact peculiar to that Record, to wit, whether or not there was sufficient evidence to sustain the charge in the indictment and the finding of the jury that the agreement in the case was not one "merely whereby union defendants were not to work upon non-union made millwork" wherever it came from (p. 551), but rather was an agreement in the interest of Chicago manufacturers that the products of their competitors in other states would be effectually kept out of Chicago with the aid of the union which they bribed with an offer of higher wages.

4. That the combination was instigated by the Chicago manufacturers for their self interest was emphasized in the Government's brief before this Court (p. 38).

5. This Court has interpreted the *Brims* case as "a case of a labor organization being used by combinations of those engaged in an industry for suppressing competition or fixing prices." (*Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 510.)

POINT VII

In the important matters of non-union articles and of the absence of the Brotherhood's union label—matters vital to the Brotherhood and trade unionism,—the Trial Court basically erred in its exclusion of such considerations as irrelevant.

(1) The right of a national or international labor union to adopt a union label and to encourage or bind its members not to work on material not bearing such label or not union-made, is a necessary principle of trade unionism and has never before been rejected judicially as a lawful labor objective.

Even under the prosecution's own interpretation of the indictment, it should have been held relevant for the jury to decide whether the unions' attitude against certain articles involved in the testimony was merely because they came from outside the state, or rather was because they were non-union made or unlabelled. Yet the jury were instructed to the contrary (1151-2).

The Constitution of the United Brotherhood provided, concerning the official union label, as follows (459, 460-1):

> "It shall be the duty of all district councils, local unions and each member to promote the use of trim and shop-made carpenter work, hotel, bank, bar, store

and office fixtures, and of church, school, household furniture, etc., and to make generally known to the members of the local union that it is necessary to all mill and shop members and the United Brotherhood that products made in factories, shops or mills where only members of the United Brotherhood are employed should be installed by fellow members. . . .

"Members of this organization should make it a rule, when purchasing goods, to call for those which bear the trademark of organized labor."

The obligations assumed by every member on his initiation include (766):

"I will use every honorable means to procure employment for Brotherhood members, agree to ask for the union label and purchase union-made goods."

The foregoing provisions of the Brotherhood's Constitution express elementary rights of trade unions, both at common law and under the Clayton and Norris-LaGuardia Acts.

Nevertheless, the Trial Court held that these constitutional provisions and the observance of them by the local unions in the Bay Area were irrelevant and not to be considered by the jury. The Court charged (1152):

"Some testimony has been heard here concerning the union label of the United Brotherhood of Carpenters and Joiners of America. In this connection, I charge you that whether the millwork and patterned lumber involved in the testimony in this case was manufactured in mills whose employees were members of the United Brotherhood of Carpenters and Joiners of America or of its affiliated unions, or whether such millwork and patterned lumber bore a union label, is not to be considered by you."

On the subjects of the union label and of non-union goods, the Brotherhood submitted various requests for instructions, all of which were refused. These refusals

are set forth in the Assignments of Error beginning on pages 1541 *et seq.* and 1566 *et seq.*

(2) Moreover, the Trial Court also ruled throughout the trial that, as regards the actions of the union defendants, the absence of the union label on articles which came before them for work or in competition with union-made articles, was wholly immaterial and irrelevant; and that, as regards any instance being put in evidence by the prosecution, the defense could not present proof that the articles involved were non-union made or unlabeled.

As examples of those exclusions of the union defendants' proof, see pages 347-9, 365, 369.

These rulings were excepted to (365-366, 369, 605), and are assigned as error (1456-7, 1604).

(3) Thus, by these exclusions of the unions' proof, the prosecution was enabled to create the erroneous impression that certain shipments were picketed or placarded by the labor defendants not in the exercise of their constitutional right of free communication and of opposition to non-union and unlabelled articles, but merely because the shipments came from without the state. (See *Senn* v. *Tile Layers Union*, 301 U. S. 468; *Bakery, etc., Local* v. *Wohl*, 315 U. S. 769.)

In other words, the prosecution was permitted to use the unions' efforts against certain incoming shipments as evidence of the conspiracy charged, but the defense was barred from showing in explanation that the articles in question were unlabelled, non-union goods (to-wit, "scab" goods), or had been made by the CIO, this petitioner's most militant enemy.

POINT VIII

The Trial Court erred in refusing the Brotherhood's requests for instructions as to the law governing the question of imputation of guilt to it by reason of any alleged acts of its officers, and in charging the jury as it did on this vital subject.

(1) It is highly significant that in the case of each local union which was indicted certain of its officials were indicted also, whereas the United Brotherhood was indicted but none of its general executive officers were.

Under these circumstances the United Brotherhood (the unincorporated international body) was vitally concerned to have the jury fully instructed on the law of *the imputation of guilt,* for there was not a particle of evidence that the United Brotherhood through its General Executive Board or the body of its membership did anything at all in the premises or even had any knowledge thereof.

(2) The General Convention is the supreme authority of the Brotherhood. It meets every four years and is composed of delegates elected from all over the United States (559).

The supreme governing body of the United Brotherhood (subject only to its General Convention) is the General Executive Board which consists of a number of members, seven of whom are elected from different regions (558).

Nevertheless, notwithstanding this established background, the Trial Court charged the jury (1138):

> "It has been stipulated in this case that labor unions are associations. Like corporations, associations are separate entities within the meaning of the Sherman Act, and may be found guilty of violations of that Act, separately and apart from the guilt or innocence of their members.

> "You are to determine the guilt or innocence of the labor unions which are defendants in this case in the same manner as you determine that of the corporations, that is, by an examination of the acts of their agents."

In the case of corporations the Trial Court charged that criminality was to be determined by the following test (1137):

> "The act of an agent done for or on behalf of a corporation and within the scope of his authority, or an act which an agent has assumed to do for a corporation while performing duties actually delegated to him, is deemed to be the act of the corporation."

The United Brotherhood excepted and has assigned error (1155-6, 1158, 1529, 1530, 1598).

Obviously, the test or standard thus given to the jury was that applicable in *a civil case*, where there is such a principle as imputed responsibility. But no such principle exists in *a criminal case*, where guilt is and must be personal.

Here there is no proof or even suggestion that the United Brotherhood ever authorized or directed any of its General Executive Officers or any other agent to commit a crime on its behalf. The authority delegated by the Constitution cannot, by any stretch of the imagination, be deemed to include commission of crime for, or in the name of, the United Brotherhood.

(3). In this criminal case the real test or standard applicable to the United Brotherhood is thus stated in Section 106 (U. S. C. A., Title 29) of the Norris-LaGuardia Act:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States

for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

In consequence, the United Brotherhood asked the Trial Court to instruct the jury (Request 56, p. 1173):

> "You are instructed that no labor union or organization can be found guilty in this case for an unlawful act or acts, if any, of individual officers, members or agents, unless you find (896) upon clear proof from the evidence that such labor organization actually participated in, or actually authorized such unlawful act, if any, or ratified such an act, if any, after actual knowledge thereof."

It also asked the Trial Court to instruct the jury (Request 55, p. 1172):

> "You are instructed that an officer of a union which is an unincorporated association is not authorized merely by virtue of his office to make his union a party to an unlawful conspiracy. In order to bind any union organization, therefore, by the act of a representative or officer it is necessary to find that the union had authorized or ratified the act."

The United Brotherhood also was vitally concerned to have the jury instructed that the United Brotherhood was not responsible *ipso facto* or on any principle of imputation for any criminal acts of any of its local unions or district councils. The following request on this subject would seem elementary (Request 57, p. 1173):

> "You are instructed that an international trade union, that is, the international body, is not responsible for the acts of a district organization or union affiliated with and chartered by it except as such international body expressly authorizes the act of the local union or association. The International Brotherhood of Carpenters and Joiners of America cannot be

found guilty in this case unless you find that it authorized acts to be done, or performed such acts with the intent of restraining interstate commerce pursuant to a conspiracy with the employer defendants to act as the instrument of the employers to suppress competition."

All these requests were refused. There are exceptions and Assignments of Error (1155, 1158, 1602, 1532-3, 1598-9).

(4) That the Court's charge and its refusals of Requests 55 and 56 *supra* were erroneous is determined by the decision of the Circuit Court of Appeals for the Second Circuit in *United States* v. *International Fur Workers Union*, 100 Fed. (2d) 541, certiorari denied 306 U. S. 653.

In that case, in a prosecution under Section 1 of the Sherman Act, a verdict of guilty was rendered against an international union (International Fur Workers Union of the United States and Canada) and against a number of its local unions and certain officers of the international and of the local unions. This verdict against the international union was reversed by the Circuit Court of Appeals *for the very error that occurred in the present case*. To quote (547):

"But an officer of an unincorporated association, no more than an officer of a corporation, is not authorized merely by virtue of his office to make his principal a party to an unlawful conspiracy. See *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, 45 S. Ct. 551, 69 L. Ed. 963; *Hill* v. *Eagle Glass & Mfg. Co.*, 4 Cir., 219 F. 719, modified on other grounds in *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275, 38 S. Ct. 80, 62 L. Ed. 286. All that the court said on this subject was that if the individual defendants did the things charged against the unions 'upon behalf of the unions,' they might be found guilty along with the individuals. To this the appellant unions excepted. It was erroneous; it excluded the

issue whether the unions had authorized or ratified what their officers did upon their behalf. For this reason the conviction of each of the labor union appellants must be reversed."

In *U. S.* v. *Local 807*, 118 Fed. (2d) (C. C. A. 2) 684, Judge Clark in his concurring opinion said (p. 688):

"It is hornbook law that, absent a clear legislative intent, an unincorporated association does not commit crimes, 7 C. J. S., *Associations*, §17, p. 43."

(4) That the Court's refusal of Request 57 *supra* was also error is conclusively determined by *Coronado Co.* v. *United Mine Workers*, 268 U. S. 295, and *Truck Drivers' Local* v. *United States*, 128 Fed. (2d) (C. C. A. 8) 227.

In the *Coronado* case, the plaintiff sued to recover damages for an alleged conspiracy by the defendants in violation of Section 1 of the Sherman Act. In the Trial Court there was a directed verdict and judgment for the defendants which was affirmed by the Circuit Court of Appeals. The Supreme Court affirmed this determination in the case of the International Union of Mine Workers of America, but reversed it in the case of the defendant local unions, and of the defendant individuals who were officers of the International and of the local unions,—thus drawing a sharp distinction between, on the one hand, the criminal liability of an International Union and, on the other hand, of its officers and local unions and their officers.

In that case one James K. McNamara, who was himself a defendant and secretary of one of the defendant local unions, had turned state's evidence and had testified that he had had talks with the defendant John P. White, who was President of the International, in which White instructed him to do various illegal and violent acts to prevent coal from being mined and sent into interstate commerce, and promised that McNamara and those who assisted him would be paid by the International Union.

White also, at various times, made speeches of "earnest approval" of the strikes, and reported on them to the International Board. Editorials in the International's magazine defended them (p. 300).

Nevertheless, and notwithstanding that the case before it was merely *a civil case*, the Supreme Court held that these acts by the President of the International and the accompanying acts of conspiracy and violence by the local unions and their officers and members did not bind and render liable the International. The Supreme Court quoted from the General Constitution of the United Mine Workers of America certain provisions which closely resemble the General Constitution of the United Brotherhood of Carpenters and Joiners of America, and then said (300):

> "It does not appear that the International Convention or Executive Board ever authorized this strike or took any part in the preparation for it or in its maintenance or that they ratified it by paying any of the expenses."

(5) Also conclusive *à fortiori* is the decision of the Circuit Court of Appeals for the Eighth Circuit in the criminal case of *Truck Drivers' Local No. 421, etc.* v. *United States*, 128 Fed. (2d) 227,—decided May 22, 1942.

There, Truck Drivers' Local No. 421, its financial secretary and business agent were convicted on an indictment under Section 1 of the Sherman Act. This conviction was affirmed as to the financial secretary, but was reversed as to the union and the business agent, on the ground that the evidence was insufficient.

In reversing the conviction of the union, the Circuit Court of Appeals held that the union could not be found guilty because of the actions of its president (who had also been indicted but died before the trial), or because of the actions of a subordinate body of the union known as the "milkmen's division", or because of the actions of the

members of such subordinate body, or because of the actions of the union's financial secretary.

The Circuit Court discussed at length the aforesaid decision of the Supreme Court in the *Coronado* case and quoted therefrom; and then said (p. 235):

> "We do not believe that on the record before us a jury could be permitted to find that the actions of the milkmen's division and its members, the efforts of the president of the union and the hearings held by the disputes committee and the executive board could be imputed to the union as a matter of general agency. To bind the union in a situation such as this, actual and authorized agency was necessary; mere apparent agency would not be sufficient to take the matter to the jury, unless the circumstances were so strong as competently to support an inference of actual authority."

See also *Barker Painting Co.* v. *Brotherhood of Painters*, 15 Fed. (2d) (C. C. A. 3) 16, 18.

CONCLUSION

The judgment against this petitioner should be reversed, and the indictment against it should be dismissed.

At the very least, a new trial as to this petitioner should be ordered.

February 10, 1945.

Respectfully submitted,

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